UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
NEW YORK BRANCH OFFICE

HOTEL 57 LLC d/b/a FOUR SEASONS HOTEL

and **Case No. 2-CA-36131**

SUSAN RAY, AN INDIVIDUAL

***Joane S. I. Wong, Esq.,* for the General Counsel.**
***Judith A. Stoll, Esq.,* Kane & Kessler, New York, NY for the Respondent.**

DECISION

Statement of the Case

STEVEN FISH, Administrative Law Judge. Pursuant to charges and amended charges filed by Susan Ray, herein called Ray, the Director for Region 2, issued a Complaint on June 30, 2004, alleging that Hotel 57 LLC d/b/a Four Seasons Hotel herein called Respondent, violated Section 8(a)(1) of the Act, by terminating Ray because she engaged in protected activities. On October 19, 2004, the Acting Director issued an Order Amending Complaint, alleging additionally that Respondent refused to hire Ray because she engaged in protected concerted activities.

The trial with respect to these allegations was held before me in New York, New York on November 3, 4, 5, 8 and 9, 2004. Briefs have been received and have been carefully considered. Based upon the entire record, including my observation of the demeanor of the witnesses, I make the following

Findings of Fact

I. Jurisdiction

Respondent a New York corporation with an office and place of business located at 57 East 57th Street, New York, New York, herein called Respondent's facility, has been engaged in the business of providing lodging and related service to the public. Annually, Respondent receives gross revenues in excess of $500,000, and purchases and receives at its facility in New York, New York goods and material valued in excess of $50,000 directly from suppliers located outside the state of New York. Respondent admits and I so find that it is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

II. Facts

Respondent is a luxury, five-star, five-diamond hotel, located at 57 East 57th Street, New

York, New York. The hotel opened in 1993, and its rooms charge up to $800.00 per night. The Respondent has operated a Spa and fitness center since its opening.

Approximately two-thirds of Respondent's employees are members of the New York Trades, AFL-CIO (the Union), where terms and conditions of employment are covered by a collective bargaining agreement. Non-union employees of Respondent are covered by a handbook known as Empact, which sets forth and obligations of employees including benefits, standards of conduct, as well as a complaint and arbitration procedure known as C.A.R.E.

Individuals performing work at the Spa and fitness center included massage therapists, esteticians (facialists), and nail technicians. All of these persons were classified by Respondent as independent contractors. They signed independent contractor agreements, received no fringe benefits from Respondent, and were paid on a commission basis. The parties litigated extensively the issue of employee status of massage therapists, the position held by Ray. The evidence revealed several areas of conflicting testimony, such as discipline and scheduling. I have not detailed these facts, nor have I set forth additional undisputed evidence concerning employee status since I have concluded that I need not resolve this issue.

Thus while the complaint does allege that Respondent terminated Ray because of her protected conduct, it also alleges alternatively that it refused to hire her, for the same reasons, at around the same time. Since the issues and analysis concerning both allegations are essentially identical in the circumstances herein, and the remedy for a violation is essentially the same, I do not deem it necessary to decide the issue of employee vs. independent contractor status of the massage therapists.[1]

Ray began working at the Spa in 1996 as a massage therapist. Over the years, Ray, as well as a number of other therapists had from time to time, complained among themselves and directly to various supervisors that they felt that they should be employees of Respondent and should be receiving benefits. The response from supervisors would be that they were aware that the employees wanted to be employees, but the Hotel considers them to be independent contractors and that is it. No action was taken against Ray or any other employee for these inquiries and complaints. On December 4, 2002, Respondent informed the massage therapists that it intended to commence a complete renovation of the Spa, to commence sometime in 2003. Respondent asked the therapists at the meeting for feedback with respect to some handouts concerning the conditions of the massage therapists.

After this meeting, the massage therapists, including Ray, began talking amongst themselves, concerning issues such as how the new Spa would affect them in various ways, such as schedule, training, pay and hours. They also began to discuss whether they would be employees when the new Spa opened or would remain as independent contractors.

In that regard, in May of 2003, Ray began to do research on the Internet concerning the issue of independent contractor versus employee. Some of these documents convinced Ray that the massage therapists working for Respondent might well be employees, and that they should be paid for down time.[2]

---

[1] While there is some differences in the analysis of discharge allegations versus refuses to hire allegations, none of those differences are relevant or in dispute here. The sole issue to be decided is the motivation for Respondent's decision to either terminate or refuse to hire Ray.

[2] At that time, although the massage therapists were considered independent contractors by Respondent, they were subject to a schedule. Although part of the schedule included on call

Continued

Ray distributed these internet articles to her fellow therapists, and they discussed among themselves going to a lawyer to see about the possibility of filing suit for back pay. Ray volunteered to consult with a lawyer and report back to the other therapists. These discussions in the spring of 2003 took place in the cafeteria. While Ray testified that at times, supervisors would be present in the cafeteria during these discussions, she did not know whether any of them heard the discussions amongst the employees.

Meanwhile, on June 1, of 2003, Respondent entered into a contract with Inova Group, a Spa development management and operations consultant practice. Inova had performed work for Four Seasons Hotels in other cities to assist in restructuring their Spa and retraining the Staff. Inova performed numerous functions under the contract, including consulting on design concept, revision of floor plans, market analysis, choice of products and treatments, arrangements with vendors, purchases of equipment, recommendations with respect to staffing levels and schedules, training of the staff, recommending compensation levels, interviewing prospective employees and making recommendation on whom to hire.

The two partners of Inova were Joe Conant and Diane Hess, who were at the Hotel from June of 2003 through and after the opening of the new Spa on September 15, 2003.

Inova also employed Noel Labak who was the Spa manager at the Four Seasons Hotel in Chicago, to assist in the training of massage therapists. In that connection Labak trained and taught the modalities required to execute the treatments required by the massage therapists. Further, he conducted several technical interviews of massage therapists in connection with the process of employment applications and made recommendations as to which individuals should be hired. As will be discussed more fully below, he conducted the technical interview of Ray, before she was rejected by Respondent for hire.

In either June or July, Conant met with each of the message therapists working at the Spa. In his meeting with Ray, Conant informed her that he was a consultant for the Hotel and would oversee the training and running of the new Spa. He asked if Ray had any questions. Ray inquired about whether she could keep the same shift and whether the massage therapists would remain independent contractors or be converted to employees, since she believed that the therapists were already employees, and had been misclassified for years. Conant responded that he agreed that the therapists should be employees, and that he would so recommend to Respondent. He added that since the therapists would be required to learn all the protocols and have set schedules, that they should be considered employees. However, Conant added that the Hotel would have to make that decision, and he was not sure that there was sufficient time to make the change, since the focus would be on training.[3]

During Conant's meeting with message therapist Mary Dolshun, Conant informed her that all therapists would have to be familiar with all the protocols. Dolshun asked what happens

---

individuals, some therapists would be required to be on site for various periods of time, even though they had no assurance of a massage. Since they received no pay absent a massage, there were times that therapists would be required to be at the Hotel, and received no pay. This was a significant complaint of therapists, including Ray.

[3] The above findings based on compilation of the credible portions of the testimony of Ray and Conant. I specifically do not credit Conant's testimony credibly denied by Ray, that she criticized supervisors Sharon Brambrut during this meeting. I find it unlikely that Ray would make such comments about Brambrut to a person whom she was meeting for the first time. Further the record is undisputed that Ray and Brambrut liked each other and always got along.

if someone doesn't want to or cannot do a particular treatment. Conant replied, "If somebody doesn't want to do it, then we'll just get somebody else. You just can't work here." Dolshun did not make any response.

Subsequently, it was announced that training for the new Spa would commence on August 25, 2003, and all massage therapists would be required to attend and to learn all the protocols and modalities. The therapists continued to meet and to discuss the ramifications of the new Spa. They talked about the possibility of becoming employees and obtaining benefits such as health benefits, comp nights at other Four Seasons Hotels, holidays and sick days. Ray mentioned her internet articles and again mentioned the possibility of seeing a lawyer. The therapists authorized Ray to meet with a lawyer on their behalf, and also encouraged Ray to ask questions on their behalf at the upcoming training sessions, about compensation and other employment issues.

On August 20, 2003 Ray met with a lawyer. The lawyer discussed the possibility of a lawsuit with Ray on behalf of the therapists, but wanted a $5,000 retainer. This was not acceptable to the therapists, so Ray decided to meet with another lawyer.

The training began as noted on August 26, 2003. Ray was talking with fellow therapist Reiko _____ about the fact that there was an Ad placed by Respondent in the New York Times for massage therapists. Brambrut was present, and Ray asked her if Respondent was hiring massage therapists. Brambrut replied "Yes." Ray asked if the new hires would be employees or independent contractors. Brambrut answered that they are going to be independent contractors. Ray inquired if they will be paid for their down time. Brambrut replied "No," and added that "if people want to volunteer their time to wait, that's up to them." Ray stated that she did not think its legal and she believes that the Labor Department considers it illegal to coerce them "to stay and work with a threat." Brambrut made no response and began to walk away. Reiko then stated, while Brambrut was still in their presence, "oh Sue Ray, very good you sound like a lawyer."

At around the same time, Ray obtained some more information from the Internet including an article about Microsoft, and a lawsuit finding that Microsoft had misclassified individuals as independent contractors, and owed "a small fortune to its misclassified workers." Ray shared this article with some of her fellow therapists. On September 8, 2003, Ray met an official of a Union, (Local 6) named Amanda Bell, and discussed the possibility of unionizing the therapists. Bell informed Ray that she also felt that the therapists were misclassified and that she had just unionized some massage therapists, and felt that they should unionize right away.

On September 9, 2003, Ray met with lawyer Ethan Brecher. He told Ray that he would be willing to represent the therapists on a contingency fee basis. However, Ray was not impressed with the way Brecher "sounded or seemed."

On September 10, 2003, Ray met with most of the massage therapists in the cafeteria. She reported to them on the results of her meetings with the lawyers and the Union. The group decided that since Ray was not impressed with Brecher, and the first lawyer wanted money up front, that she would meet with a third lawyer. In fact Ray had already obtained a third name from the Internet, and had an appointment scheduled. The record does not reflect, what if anything the therapists decided to do about the Union at this meeting.

According to Ray, while this meeting on September 10 was conducted, several representatives of management, including Brambrut, Conant, and Hess were present in the cafeteria at another table, about 20 feet away from where the massage therapists were having

their discussions. While Ray characterized the supervisors as within "earshot" of the conversations among the massage therapists, Ray admitted that during the conversations, "we were like 'shhh!' as were talking about it because we didn't want to let them know that we were actually considering taking any action." She also admitted that the managers were talking among themselves, that there were other people in the cafeteria between managements table and the therapists table, and that she did not notice if the managers were paying any attention to her table.

Mary Dolshun testified about another conversation in the cafeteria between herself, Ray and employee Kelly Cummings sometime in late August of 2003. According to Dolshun, Yvonne Mancini, Respondent's Director of Human Resources, was sitting at another table in the cafeteria, having soup, three feet away from the therapists table. Dolshun also asserts that it was late afternoon, and the cafeteria was relatively empty. Dolshun contends that Ray began talking loudly about the fact that she had talked to a lawyer and someone in the Union, and what rights the therapists might have and what benefits they might be entitled to receive. Dolshun further asserts that she noticed Mancini sitting at a nearby table 3 feet away, and said to Ray "you know Yvonne Mancini is right here. I really don't want to discuss this right now." Ray allegedly replied, "I really don't care if they know that I'm going to lawyers and I know my rights." Notably, Ray did not furnish any testimony concerning this alleged incident. Dolshun also conceded that Mancini's back was turned to the therapists during the discussion, and that she only "assumed" that Mancini could hear what was being said by Ray.

Mancini, Conant and Brambrut all testified that they were unaware of Ray going to see lawyers on behalf of other therapist's or that she had gone to the Union. They further deny overhearing any conversations of therapists in the cafeteria, during which these subjects were discussed.

The training for the massage therapists began on August 26, 2003. The morning sessions were conducted by Conant and Hess, while Brambrut was present at times. The training included other Spa staff as well as massage therapists. Conant would discuss the particular product involved and introduce the vendor, who would explain their products and how to use them. In the afternoons, specific training sessions were held for each profession.

During the morning meetings, prior to the vendor being introduced, Conant would entertain questions and comments from the staff about various issues. The first two meetings were held on August 26 and 28, 2003. At that time, no decision had been made concerning employee status after the changeover to the new system, nor had decisions been made as to compensation or scheduling. Therefore there were numerous questions about these matters from many of the therapists, of which Ray was the most vocal and most persistent. Most of the time, Conant would not be able to answer these questions, since no decisions had not yet been made by management. Therefore he would respond to these inquires by telling the therapists that Respondent was "working on it" or "I can't answer that," or that Mancini should be spoken to about the particular issue. A number of therapists including Ray were upset with Conant's failure or inability to answer their inquiries, and would make comments such as "that sucks", when Conant would not or could not respond to their concerns. Ray also asked a question about client cancellation policy, and told Conant that Respondent presently had a two hour no cancellation policy. Conant replied "oh no, if clients cancel you don't get paid for that." Ray replied that she thought that wasn't fair. Conant turned his back to Ray at that point, and did not respond.

Conant began to get somewhat frustrated by the repeated questions and comments by Ray, as well as other therapists. He felt that the training was being delayed, since he was

compelled to discuss therapists' complaints and questions, rather than being able to proceed with introducing the vendors and continuing the training. He would tell the therapists to "stay focused," but made no specific request to Ray or any other therapists to stop asking questions or making comments, so that training can proceed.

Conant also mentioned during the first two meetings that all the therapists would be required to learn and perform all the treatments offered at the Spa, and in the same manner as prescribed in the protocols. A number of therapists including Ray made complaints about these requirements, as being restrictive of therapists' individuality and akin to "cookie cutter" massages.

On August 29, 2003, Respondent held a meeting with the entire Spa staff, including the therapists. Mancini conducted the meeting, and informed the staff that under the new structure, the therapists would be employees of the Hotel with regular schedules, either full-time, part-time or on call. They would be required to be on premises at all times during their scheduled shifts. She explained that shifts would be 6 ½ hours long with a 30 minute break. Mancini also informed the staff that as employees they would be required to punch in and would be provided with a uniform.

Mancini explained benefits eligibility and distributed a handout discussing information concerning the benefits available for which types of employees. (i.e full-time versus part-time.)

Mancini announced that compensation would be a percentage of rates for various massage services, but with a guaranteed minimum of $11.00 per hour. A number of therapists including Ray had questions about these issues, which were answered by Mancini or Conant. Ray as well as others were upset with the compensation, and expressed the opinion that the therapists should receive the $11.00 per hour pay, plus their commission. However, Respondent's officials replied that the $11.00 would be only a minimum guarantee, to be paid only if therapists did not receive commissions of $66.00 per day.

Mancini, also distributed applications to all the therapists and informed them that since it intended to open the new Spa on September 15, that the applications should be completed and submitted by September 2, 2003. She added that after the submissions, applicants would have personal and technical interviews.

After this meeting, training continued through mid September and thereafter. The procedure would be the same. Conant and Hess would conduct the meeting, and introduce the product and the vendors to explain their products. Once more, prior to the vendor being introduced, therapists would have questions or comments about work related issues such as compensation and scheduling. Once again, Ray was the most outspoken and persistent of the therapists, and would ask more questions than any of the other therapists. As was the case in the training prior to August 29, 2003, Conant felt that the frequent questioning and comments by Ray, and others was delaying the training, so he would respond that he didn't have the answer, lets save it for later, or we're talking about something else now. He would also again remind the therapists to "stay focused," but did not at any time address himself specifically to Ray, or instruct Ray personally to stop asking questions, or making comments. There were times however, when Ray would respond to Conant's inability to answer that "I understand you don't want to answer, but it is important for us to get these answers at some point." During one of these meetings, Ray posed a question to Conant and he responded. Ray then replied, "I have gone to lawyers about that. I do know about this. Because I have talked to lawyers."

On or about September 9 or 10, while Conant was conducting another training session, Ray asked Conant how Respondent established the $11.00 an hour minimum compensation rate. Conant replied that "Human Resources had established what was fair in the market." Ray persisted and asked how is that fair, and asked if Respondent used New York City rates, where the cost of living is high or internationally? Conant answered that he did not know and suggested that Ray ask Mancini or HR that question. Ray insisted that $66.00 per day is not fair for New York City, and it is also not fair that if the therapists have treatments on their shifts, their hourly pay would be canceled, which Ray characterized as the same as before, and not like "an employee situation." Conant responded that "the therapists should not worry, because they will be receiving tons of massages."

Ray then asked how vacation will be computed, and Conant answered $66.00 per day pre-tax. Ray stated "where are we going to go in the world on less than $66.00 per day?" Dolshun chimed in, "the only place you can go is Bali or a third world country. Where are you going to go on vacation on less than $50.00 a day?"

Some of the therapists began to laugh. Ray then said to Conant, "it's easy for you to say, because you don't make $11.00 per hour." At that point, nearly everyone, including therapist Keith Lovinggood started laughing. Lovinggood then stood up, made a "thumbs down" gesture, and began to "boo" for about 15 seconds. Ray stood up, but did not make a "thumbs down gesture" or "boo." However, Ray seeing that Conant began to get red in the face and appeared to be upset, tried to apologize by saying to Conant, "I mean no disrespect, you misunderstand me. But these are important things for us to know. This is our livelihood." Ray also said to Conant "we're just trying to figure out what's going on and we need to know information." Mary Dolshun added that "these are important issues and we all made sacrifices. We've been patient for answers and decisions."

The above findings concerning the events at the meetings in August and September of 2003, is based on a compilation of the credited portions of the testimony of Ray, Conant, Brambrut and employee Mary Dolshun. For the most part, where the record reveals conflicting testimony between Dolshun and Ray and Conant and or Brambrut, I have credited Dolshun and Ray. I note particularly that Dolshun is a current employee of Respondent, and her testimony is more worthy of belief. *Meyers Transportation,* 338 NLRB 458, 468 (2003); *Stanford Realty,* 306 NLRB 1061, 1064 (1992); *Georgia Rug Mill,* 131 NLRB 1304, 1305 fn.2. (1961).

Additionally, I found Conant's testimony has demonstrated a tendency to exaggerate on cross examination, and his testimony at times inconsistent with that of Respondent's other witness, such as Brambrut and Mancini, particularly whether Conant recommended that Lovinggood be terminated. Finally, I note the absence of any testimony from Hess, who was present at all of the meetings. I therefore do not credit Conant's testimony that Ray "interrupted" vendors while they were speaking, or that she was continuously talking with other therapists while he and or vendors were speaking. I also do not credit his testimony concerning the alleged statement made to him by a vendor, allegedly complaining about Ray's behavior. Further, I find, contrary to Conant, that the incident involving Lovinggood's "thumbs down" and "booing," took place on September 9 or 10, rather than prior to August 29, as testified to by Conant. In that regard, since the incident was precipitated by a discussion of Respondent's proposed $11.00 per hour payment for minimum compensation and vacation, it could not have taken place prior to August 29, since Respondent had not announced such figures until the August 29 meeting.

On the other hand, I do not credit Dolshun that the $11.00 payment was not announced until the September 9 or 10 meeting. I note that Dolshun was not present at the August 29

meeting, and even Ray conceded that the $11.00 compensation was announced and discussed at that meeting.

Further while Ray denied that she stood up in support of Lovinggood when he made the "thumbs down" gesture, I credit Conant and Brambrut that she did so. I note that Dolshun did not support Ray's denial that she had stood up at the time. Although both Ray and Dolshun testified that they didn't recall Lovinggood "booing" during the incident, their testimony was equivocal and uncertain on this issue. I therefore credit the mutually corroborative and clear testimony of Conant and Brambrut that Lovinggood did in fact "boo" while he gave a "thumbs down" gesture on September 9 or 10, 2003.

On August 30, 2003, Ray submitted an application for a part-time position. She requested various shifts mainly in the afternoons and evenings, from Friday through Tuesday, with Wednesday and Thursdays off. On or about September 3, Ray was interviewed by Yvonne Mancini, and separately by Hess and Brambrut.[4]

During the interview with Mancini, they discussed issues of pay, scheduling and when the therapists would know when they would be hired. Mancini stated that no decisions had been as yet concerning when therapists would be notified of their hiring. After the close of the interview, Mancini filled out a portion of Respondent's interview form. Mancini rated Ray satisfactory under the categories service passion, professionalism, ethic for work/integrity, and communications skills. Mancini under comments wrote, "stated BBI,[5] answers clearly, she communicates matter-of-factly, not demonstrating too much warmth, seems goal oriented. Grooming concern. Hair not held back, very relaxed." Mancini also checked off "at risk" in the recommendation section of her portion of the form.

Mancini testified that Ray appeared at the interview with her hair "disheveled," and not held back. While Mancini admitted that there was no requirement that therapists have their hair "held back," she felt that Ray's failure to wear her hair back during the interview showed a lack of seriousness in the interview. Mancini further testified that she marked "at risk" on the form for Ray, because she felt that Ray was not warm during the interview and her answers were "robotic" and "disengaged" and Mancini had questions about Ray's ability to fit in with the "Four Seasons culture."

Mancini also testified that she had previously been informed by both Conant and Hess that they were unhappy with Ray's conduct during training, and that Ray would be repeatedly asking questions over and over, which Conant could not or would not answer, and that this seriously delayed training. Mancini was also informed at some point, about the incident with Lovinggood, and that Ray had stood up in support of Lovinggood when he made a "thumbs down" gesture and "boo'd" Conant.

However, none of these reports, according to Mancini, were considered by her when she wrote "at risk" on the form.

Ray also interviewed with Hess and Brambrut. Ray was informed by Brambrut the evening before at 10:00 P.M. that the interview was scheduled for 10:00 A.M. the next morning. Ray replied that she didn't have her interview clothes ready, and would be in training at 9:00

[4] The record is unclear to which interview came first.

[5] BBI refers to Behavior Board Interviewing, which are questions used in interviewing all Four Seasons prospective employees.

A.M. the next morning. Brambrut responded that "don't even think about that." It's going to be a quick informal interview. We just want to get this done, and everyone knows that all the therapists are dressed down because they are practicing body treatments and they are practicing massages." Ray replied, "Sure, if you don't mind, I don't mind. 10 o'clock is no problem."

Ray met with Brambrut and Hess in a storage room, dressed in a t-shirt and jeans. Ray began by apologizing for her casual attire, stating that she had no time to change. Hess asked Ray how she felt about the changes in the Spa. Ray replied that she was a little concerned about things, "but I'm willing to stick it out." The concerns she expressed were about pay and whether Respondent had already decided on whom to hire. Hess and Brambrut both replied, "no, everyone has a fair chance."

Ray also complained that the situation is the same as when the therapists were independent contractors. Hess replied "not really since the employees will get benefits." Ray responded that "only full-time employees will receive benefits." Hess answered that "even part-time employees would receive room privileges at other Four Seasons resorts." Ray continued to insist that "at least for the part-time or on call employees, the situation was really the same as the independent contractor situation. Ray added that she believed that the therapists had been employees the whole time. Ray informed Hess and Brambrut that she used to work as a paralegal at the Proskauer law firm, and that she had seen a memo on Proskauer's online site written by one of their partners about the importance of classifying employees properly. Ray added that she had thought that Respondent was represented by Proskauer, and that she was surprised that Respondent was not taking that very seriously." Neither Hess nor Brambrut made any comments about or response to these statements by Ray.

Hess and Brambrut asked if Ray liked the products. She replied that she liked them, but she was a little concerned with some of the treatments because Respondent was making them shorter, and they were more "fluff" treatments. She added that she did not know how the clients were going to respond, but "I'm giving you my application because I'm willing to stick it out."[6] Most of Ray's testimony wasn't contradicted by Brambrut, but to the extent that Brambrut's testimony differs from Ray as to the interview, I credit Ray. Brambrut's testimony that Ray called the treatments "ridiculous," and gave her the impression that she was not willing to give them a try is not credited. Such testimony is contradicted by her comments on the interview form, which makes no such assertion, and which does state that Ray "is excited about the new changes."

The portion of the interview form filled out by Brambrut, in addition to stating that Ray is "excited about new changes," also states that Diane (Hess) "is concerned about strong personality characteristics." Brambrut did not explain what Hess meant by this comment and Hess did not testify. Brambrut did testify that after the interview, Hess told her that she (Hess) felt that in all of her interactions with Ray including the interview process, that Ray was "very negative" towards the new Spa. However they did not discuss at that time whether or not either of them were going to recommend that Ray be hired. Brambrut admitted that at that point she had not made up her mind whether or not to recommend Ray's hire.

On the interview form, Brambrut also noted that Ray "is a great therapist, who is good at handling difficult situations, concerned about her loyalty to the company." According to Brambrut what she meant by loyalty to the company is that she believed that Ray was "very

[6] The above description of the interview is based primarily on the credited testimony of Ray.

negative" towards the changes, towards being part of the company, towards being part of the team." Brambrut also put a question mark next to the category on the form, "team player." When asked why she made that question mark, Brambrut replied, "I think that I put the question mark there because I felt that that was questionable, but I am not sure."

Moreover, on the same form, Brambrut checked the following dates in the multiple choice area:

> Is comfortable with more than one approach to his or her work; is willing to try and adopt new ways of doing things.

Ray received a technical interview from Noel Labak. Labak had been informed by Conant prior to the technical interview that Ray had been giving Conant "a hard time" during training, by asking a lot of questions and being "disrespectful" to Conant.

During the technical interview, Ray demonstrated her ability to give massages, and it did not take Labak long to discover that Ray was "a great therapists," and that she had "great hands." However, while she was giving Labak a massage, Ray talked constantly, expressed resentment towards Inova, the Hotel and the planned changes in the Spa. Ray informed Labak that she did not like the idea of working a set schedule and being required to be at the hotel for an entire shift. Ray also said that some of the treatments that the therapists were being required to learn were "silly," that she did not like some of the treatments, didn't want to do some of them, and that she "wanted to do her own type of massage." Ray told Labak that "she likes doing her massage, and that's what she would do." She also pointed out to Labak that "no one would know what I was doing in the room."

The above findings with respect to the technical interview is based on the credited testimony of Labak. While Ray adamantly denied making any of the quoted comments to Labak, I do not credit such denials. I found Labak to be an extremely credible witness, who testified consistently on direct and cross examination. Further I believe that he felt uncomfortable about giving adverse testimony concerning a "great therapist," was testifying truthfully to best of his recollection. While I have credited Ray in other portions of her testimony, particularly where it was corroborated by Dolshun, I cannot and do not do so here. I find it unlikely that Labak would simply make up these comments that he attributed to Ray, and find that Ray feeling relaxed during the interview and knowing that Labak was satisfied with her skills in giving a massage, confided to him her true feelings about the treatments. I note in this regard that Ray admitted that she did not like some of the treatments, and felt as did many other therapists that they were "fluff" and or "cookie cutter," and the requirement that they all be performed in a specified way interfered with the individuality and creativity of the therapists.

After the technical interview, Labak informed both Brambrut and Conant, that although Ray was a great "technical" therapists, he believed that she should not be hired, because of the comments that she made to him about not wanting to perform all the treatments, and not wanting to do all the protocols. He also told them of Ray's remark that "no one would know what she is doing in the room." As Labak testified, "for me this was a red flag because it's very important that when a client comes in and has a specific massage that has a specific description and protocol, that that is the treatment they get."

All of the approximately fourteen massage therapists working for Respondent submitted

applications for employment, either for full or part-time positions.[7] Respondent's officials met on or about September 10, 2003 to decide which of the therapists will be hired when the Spa opened on September 15, 2003. Present were Conant, Hess, Brambrut, Mancini and Thomas Steinhauer, Respondent's General Manager. The group went over each applicant one by one. Comments were made by the participants about the applicants, and recommendations were made whether or not to hire each applicant. The ultimate decision was made by Steinhauer, who said very little, other than to sign off on the consensus decision reached by the other four participants.

All of the applicants whose applications were considered were hired,[8] except for Ray and Lovinggood.

With respect to Ray, Conant, Hess, Brambrut and Mancini all recommended that she not be hired. The reasons expressed at the meeting by these four individuals included Ray's disruption of training sessions by continually asking questions and making comments, the belief of the participants that Ray would not agree to follow the protocols, based primarily on her statement to Labak, and finally her grooming. Steinhauer did not indicate which if any of these reasons he considered most significant or determinative, but merely said that it is unanimous that Ray not be hired, and approved that action.

Conant, Brambrut and Mancini all testified to their reasons for recommending that Ray not be offered employment.[9]

According to Conant, he concluded that Ray not be hired because of her negative attitude toward the hotel, which he conceded included "disruptions" during training. However he stated that since other therapists "did that too", that wouldn't have been the deciding factor. "The deciding factor for me was that she stated very clearly that she did not feel that she had to fulfill the requirements of doing the protocols as written. And that she was going to --- inside the treatment room it's just her and the guest, nobody else is going to know whether she is doing the protocol or not, and that she was going to do things the way she wanted to do them."

Conant also detailed more specifically that by disrupting the training process, he meant that Ray disrupted meetings by talking about and asking questions about problems, which interfered with his presentation. As Conant further explained he had previously complained to Mancini and Brambrut, "Sue Ray disrupted this. We haven't even gotten to this yet because she's just talking about...."

Conant did admit that he was upset about the incident involving Lovinggood, but claims that he did not blame Lovinggood's conduct on Ray. However, Conant concedes that he did mention to Mancini when reporting the incident that Ray had stood up along with Lovinggood while he "boo'd" and made a "thumbs down" gesture. Further, Conant testified that he believes that Lovinggood was being influenced by Ray. Conant testified that although he felt that Lovinggood was unprofessional during training, particularly in the above described incident, but

---

[7] The record reflects that one therapist, Reiko _____ subsequently withdrew her application.

[8] As noted, Reiko withdrew her application so she was not discussed.

[9] As noted, Hess did not testify. However the record discloses that at the meeting, the only reason mentioned by Hess for her recommendation, was Ray's "disruptive behavior" at the training sessions. Hess made no mention of Ray's statement that she would refuse to perform some of the protocols.

that he believed that "Keith was following Sue Ray's example. Keith was really sort of like getting his negative... sort of bouncing his and feeding off of Sue Ray. And if Sue Ray was removed, a lot of that negativity may go away," Indeed, as noted above, Lovinggood's conduct in "booing" and making the "thumbs down" gesture, was precipitated and preceded by Ray's complaints about Respondent's proposed vacation and compensation payments to the therapists.

Brambrut testified that it was hard for her to make the decision not to recommend Ray for hire, because she liked Ray as a person. However, Brambrut felt that Ray was not interested in being part of the "Four Seasons culture," and "I didn't think that she would be a positive force in this new environment, this new Spa." Brambrut also relied on Ray's "negative" conduct at the training sessions. Brambrut explained what she meant by Ray's "negative" conduct. Brambrut stated that Ray's questions "weren't asked in a professional manner." When asked to explain further the transcript reveals the following:

> The Witness:
>
> I guess that they were more ..., I couldn't give you an exact sentence, but I think that they were more statements, like there was the late night question about what late night starts. Because, it was to start at nine, and then it started at ten. And, I think one of the questions was, well, like, "you're not really going to change the time," or, you know, just in that nature, more of a ... negative sort of statement as opposed to an actual question.
>
> Judge Fish:
>
> So, what you're saying is that rather than asking a question, she would be making a comment, that ....
>
> The Witness:
>
> Right.
>
> Judge Fish:
>
> ... Which would be critical of the way Four Seasons was contemplating doing things.
>
> The Witness:
>
> Right.
>
> Judge Fish:
>
> Is that right?
>
> The Witness:
>
> Right, yes.

Judge Fish:

And that was negative in your view.

The witness:

Yes.

Mancini testified that she recommended that Ray not be hired because "we cannot have someone in the hotel, who isn't even before the fact, willing to comply with what our ... our standards of procedures would be." Mancini also admitted that she considered the reports and recommendations from Conant, Hess and Brambrut that Ray had engaged in disruptive behavior at training sessions and had held up the training by asking too many questions. Mancini further elaborated on her view of Ray's conduct in asking questions during training. "It was the manner in which she continuously just ... just didn't let go of some of the questions."

As noted neither Hess[10] nor Steinhauer testified. As also noted, after Conant, Hess, Brambrut and Mancini all recommended that Ray not be hired, Steinhauer signed off on the collective decision by stating:

> All right, you know, it seems that we have come to a determination that Sue Ray is not going to be hired for the Spa."

While Respondent's witnesses all agree that Lovinggood is the only other therapist whose application was considered and rejected, they disagree as to whether Conant recommended that Lovinggood not be hired. Conant contends that he was "on the fence" concerning Lovinggood. He contends that when Lovinggood's name was brought up, Hess recommended that Lovinggood not be hired because of his conduct in disrupting training, i.e., the incident involving the "thumbs down" and "booing," and that she (Hess) did not know if he was going to follow the protocols or not.[11]

Conant contends that he stated that if Ray were removed, Lovinggood "wouldn't be so negative. He wouldn't have that person that he's sort of feeding off of." As related above, Conant testified that he said that although Lovinggood was unprofessional in the training, (mentioning the "thumbs down" incident) he believed that Lovinggood was bouncing off and "feeding off of Sue Ray, and if Sue Ray was removed, a lot of that negativity may go away. That was my recommendation."

Conant further testified that he did not recall either Brambrut or Mancini say anything about Lovinggood, and that in fact he didn't recall a decision being made concerning Lovinggood at the meeting. Conant asserts that he was informed after the meeting by Hess, that Lovinggood had been informed that he wasn't being hired.[12]

---

[10] While Hess did not testify as to her reasons for recommending not hiring Ray, the testimony of Conant, Mancini and Brambrut reveal that Hess focused on Ray's "disruptive" and "negative" conduct during training, and also made some reference to Ray's grooming, i.e., her hair.

[11] Conant did not specify why Hess believed Lovinggood might not follow the protocols, or whether Hess gave any reason at the meeting why she so believed.

[12] Indeed Conant also testified, contrary to the testimony of Brambrut and Mancini, and contrary to my findings above, that no decision was made concerning Ray at the meeting and

Continued

On the other hand, both Brambrut and Mancini testified that Conant as well as all the other participants recommended that Lovinggood not be hired and that the decision was made at the meeting. Brambrut testified that Conant brought up the "thumb down" incident and stated that Lovinggood was negative and had disrupted training by asking inappropriate questions and mentioned his hostility towards the new changes. Brambrut also asserted that Lovinggood had expressed to her, as well as to Hess and Conant that Lovinggood wasn't interested in learning the standardized treatments.

Mancini also testified it was a unanimous decision not to hire Lovinggood. Mancini contends that Hess and Conant stated that while Lovinggood's technical abilities were good, they were not great. Further both Hess and Conant said that they were very disturbed by Lovinggood's demonstration of "thumbs down" and "booing", which showed disrespect and unprofessionalism, and inappropriate behavior. Further they contended that Lovinggood "didn't really buy into the changes that were necessary" to move forward in the Spa. Thus, based on these reasons, according to Mancini, a decision was made that Lovinggood not be hired.

Neither Mancini nor Brambrut recalled that when the discussion at the meeting ensued concerning the "thumbs down" gesture and "booing," by Lovinggood, whether it was mentioned that Ray stood up during that incident. However, as related above both Brambrut and Mancini were aware that Ray had done so. Brambrut observed the incident, and Conant reported it to Mancini, including the fact that Ray had stood up, along with Lovinggood while he was "booing" and making the "thumbs down" gesture.

Conant also provided testimony concerning the discussion of Dolshun at the meeting. According to Conant, he initially suggested that Dolshun not be hired, "because she was very verbose, and she'd talk during the service." He added that Dolshun would be "dissatisfied with things, she would listen to what I had to say and she would express herself again." However, Conant further testified that Hess and others at the meeting "expressed positive things" about Dolshun. Therefore, Conant changed his opinion to being "on the fence" with respect to Dolshun, and Dolshun was eventually hired. Neither Brambrut nor Mancini furnished any testimony concerning the discussion at the meeting about Dolshun.

On September 11, 2003, Ray was escorted into Mancini's office by Hess. Mancini informed Ray that after evaluating all the information, Respondent had decided not to hire her. Ray replied "you're firing me?" Mancini responded "no we're not. You're just not being hired." Ray answered, "I don't care what you call it, Yvonne, you are firing me. I've been here for eight years."

Mancini stated that it had nothing to do with her massages, adding "you give a great massage." Ray pressed for a reason. Mancini answered, "It has to do with your attitude, your demeanor and your grooming." Ray questioned the grooming comment, and stated that after eight years with the same hairstyle, Respondent suddenly decided that they don't like her hair and it's not "Four Seasons standards."[13] Ray then commented, "in reference to my attitude, the real reason why I feel like I'm sitting in this room is because I've been questioning the legality of the employment practices, and you don't like it." Mancini replied "that's not the case," that it was because of her negative attitude and demeanor. Hess then interjected that Ray was "disrespectful to Joe in the meetings?" Ray asked, "How so?" Hess responded, "You shouldn't

---

that he was informed by Hess after the meeting that Respondent had decided not to hire Ray.

[13] In that regard, Dolshun corroborates Ray's testimony that Ray had essentially the same hairstyle for at least six years.

have asked him questions about money in the meetings." Ray answered "It was a meeting about the changes in the Spa. It's just the forum to ask questions about salary changes as well." Hess added, "You should have pulled him aside and asked him independently alone." Ray retorted "Why? The questions had to do with all of us. It wasn't like I was getting some special pay salary. The questions I wanted to know referred to all of us." Hess then said that Ray was "very negative and disrespectful" and that she was "different than the others." Ray replied "That's ridiculous. The others feel exactly the same way I feel. I was just more vocal about it."

At that point, Hess changed the subject, and brought up the fact that Ray apologized for lack of interview clothes during her interview. Ray explained that she felt uncomfortable about it, but that Brambrut had spoken to her about the matter the night before, and told her that it was "a non-issue." Ray then added, "If you two aren't communicating that I was going to be coming in that way, not dressed in a suit, I can't help that. But she did tell me that it was a non-issue." After an uncomfortable pause, the discussion turned to how Ray would be permitted to clean out her locker and Ray left the room.

Mancini admits that she did not tell Ray that her contract as an independent contractor was terminated, and concedes that it did not occur to her that there were still four days left before the September 15 start date. Indeed, Mancini did not recall whether Ray was scheduled to work between September 11 and September 15, 2003[14] After Ray was informed of Respondent's actions towards her, she saw Lovinggood, who informed her "I just got fired." The record does not reflect what Lovinggood was told during his meeting with Respondent's officials.

The parties stipulated that the only applicants were not offered by employment by Respondent as employees of the Spa in September 2003 were Ray and Lovinggood. The parties also stipulated that fourteen massage therapists, including Ray and Lovinggood but not including Reiko, applied for employment at Respondent in September of 2003. The parties further stipulated that four of the above group, including Dolshun were hired as full-time massage therapists in September of 2003.

Further, record testimony establishes that Respondent hired approximately 10 part-time employees, including two new employees, who had not participated in the training, and who had been obtained through an ad placed by Respondent in the "New York Times." As of the date of trial, Respondent was still hiring additional massage therapists.

III. Analysis

The first issue to be decided is whether, as alleged in the complaint, as amended, and denied by Respondent that Conant, Hess and Labak are agents of Respondent.

The Board will find agency status where employees would reasonably believe that the individual in question was reflecting company policy and speaking and acting for management. *Pan-Oston Co.,* 336 NLRB 305, 306 (2001); *Cooper Industries,* 328 NLRB 145 (1999); *Southern*

[14] My findings with respect to the discussions on September 11, 2003 are based on the testimony of Ray, which was detailed, credible and consistent on direct and cross. Hess did not testify. Mancini's version of the conversation was not nearly as detailed, but not substantially inconsistent with Ray's version, Mancini testified that she told Ray that she was not being hired because of her unprofessional, inappropriate behavior throughout the process. Mancini added that Hess told Ray that she had exhibited inappropriate behavior during training.

Bag Co., 315 NLRB 725 (1994).

Here, there can be no question that Conant and Hess were agents of Respondent. They were introduced by Respondent as consultants for the new Spa and that they would be overseeing the training and running of the new Spa. The employees were informed that the consultants would be making decisions on treatments and protocols to be used, and that employees must follow their directives in these areas. The consultants made recommendations to Respondent concerning various other issues concerning terms and conditions of employment of the therapists, including employee status, compensation and other benefits. Further they were directly involved in interviewing applicants for employment by Respondent and making effective recommendations as to which therapists to hire. Based on the above, Conant and Hess are and have clearly been agents of Respondent. I so find.

Labak's situation is less clear, but since he was also involved in the interview and training process, and he also made recommendations as to which therapists Respondent should hire, I also conclude that he was an agent of Respondent.[15]

Turing to the merits of the allegations in the complaint, General Counsel contends that Respondent discharged and or refused to hire Ray in retaliation for her protected conduct on or about September 11, 2003. In order to decide the issue of whether Respondent unlawfully discharged Ray, it would be necessary to decide whether she, as well as other therapists were employees of Respondent or independent contractors at that time. However, as I have mentioned above, I do not deem it essential to resolve this issue.

In that regard, Respondent argues that Ray, as well as the other therapists, were independent contractors, at the time of the alleged discrimination against Ray. Therefore, since Section 2(3) of the Act expressly excludes independent contractors from the definition of "employee," a finding that Ray was an independent contractor means that she is not afforded any protection under the Act. I disagree.

It is well settled that an applicant for employment is treated as an employee under Section 2(3) of the Act. *Phelps Dodge v. NLRB,* 313 U.S. 177, 191-193, 61 S. Ct. 845 (1941); *Reliance Insurance v. NLRB,* 415 F.2d 1, 6 (8th Cir. 1969); *Mainline Contracting Co.,* 334 NLRB 922, 923, fn. 5 (2001); *Labor Ready Inc.,* 327 NLRB 1055, 1058 (1999), *enfd.* 253 F.3d 195 (4th Cir. 2001); *Mason-Rust,* 179 NLRB 435, 439-440 (1969), *enfd. denied in other grounds,* but *affirmed in pertinent part,* 449 F.2d 425, 427 (8th Cir. 1971). Thus Ray although she may have been an independent contractor for Respondent, was also an applicant for employment with Respondent at the time of the alleged discrimination against her.[16] It was Ray's status as an applicant for employment which gives rise to her protection, and not her previous status as an alleged independent contractor. Ray should be treated no differently from someone off the street, with no previous connection to Respondent. She is entitled to non discriminatory

[15] Notwithstanding my finding that he was an agent of Respondent, and having considered same in my credibility resolutions detailed above, I nonetheless for the reasons described above, credit his testimony over that of Ray, concerning Ray's comments to him during her technical interview.

[16] In that connection, I conclude that she became an applicant for employment in late August, when the training began for the new Spa, since that was the start of the application process. At the very latest, she became an applicant when Respondent announced the decision that workers at the new Spa would be employees on August 29, 2003, and distributed applications for employment, which application was submitted by Ray.

consideration of her application for employment, which cannot be based on her exercise of protected concerted activity. *Mainline Contracting, supra; Mason-Rust, supra; Phelps Dodge, supra.*

While as I have observed, these are some differences in analysis of alleged unlawful discrimination in refusal to hire *vis à vis* unlawful discharge cases, none of these differences are present here. Thus in discriminatory discharge cases, under the analysis of *Wright Line,* 251 NLRB 1083, 1089 (1980), General Counsel must establish that the employee's protected conduct was a motivating factor in the employer's decision to terminate the employee. The burden then shifts to the employer show that it would have taken the same actions in the absence of the protected conduct.

Under *FES,* 331 NLRB 9, 12 (2000), the Board utilizes the *Wright Line* approach to analyze refusal to hire cases, but adds some additional requirements to General Counsel's prima facie case. They are that the employer is hiring at the time of the discrimination, and that the applicants had the relevant experience or training for the position. Here there is no dispute that Respondent was hiring in September of 2003, and that Ray had the relevant experience or training for the position. Thus, the only issue to be decided is whether animus towards Ray's protected conduct contributed to Respondent's decision not to hire Ray, and if so, whether Respondent has shown that it would not have hired her, for other reasons, even in the absence of her protected conduct. Therefore the issues to be decided in both the refusal to hire and discharge allegations are virtually identical, and the remedy is virtually the same as well. In such circumstances, I find it unnecessary to decide the troublesome issue of whether or not Ray and the other massage therapists were independent contractors, prior to the alleged discrimination against Ray on September 11, 2003. I shall therefore decide only the refusal to hire complaint allegation.

As I have detailed above, there is no dispute about and I find that Respondent was hiring employees in September of 2003, and that Ray had the training and experience to perform the job of massage therapist. Therefore the only disputed issue to be decided, is whether Respondent refused to hire Ray because of her protected concerted activities.

There can be little question, and in fact, it is not disputed by Respondent that Ray engaged in a significant amount of concerted activity as defined in *Meyer Industries,* 281 NLRB 882, 887 (1986). Such concerted activity began in the spring of 2003, and continued up until the date that Respondent notified Ray of its refusal to hire her. The activity consisted of Ray's discussions with her fellow therapists concerning terms and conditions of employment, particularly their common desire to be treated as employees of Respondent. In that regard, Ray obtained articles on the Internet concerning the issue, met with two lawyers, as well as a representative of the union about the matter, and reported on her meetings with these people to her fellow employees.

However, as Respondent correctly observes, there is no direct evidence that Respondent became aware of any of these activities of Ray. General Counsel argues that knowledge of these activities, can and should be inferred from the evidence that while Ray and her fellow therapists were discussing these issues in the cafeteria, various supervisors were within "earshot," and likely overheard Ray informing the therapists about her meetings with lawyers and or union representatives.

However, I find the evidence presented by General Counsel in this regard to be inconclusive and insufficient to establish that any supervisors overheard Ray's comments.

In this regard, Ray testified that on September 10, 2003 which she was reporting to the therapists about her meetings with lawyers and union representatives, various supervisors including Brambrut, Conant and Hess were present in the cafeteria, about 20 feet away. While Ray characterized the supervisors to be within "earshot," she conceded that the therapists were saying during the discussions "like, shhh!" while talking, because they did not want Respondent to know that the therapists were considering taking any action. Ray further admitted that she did not notice if any of the managers were paying attention to her table, and that the managers were talking among themselves.

Dolshun testified about another alleged incident in late August, also in the cafeteria, where she, Ray and therapist Kelly Cummings were allegedly discussing Ray going to lawyers and the Union, and according to Dolshun, Mancini was sitting at another table, three feet away from the table, while allegedly eating soup.

I do not find the above evidence sufficiently compelling to conclude that anyone from management overheard any of the conversations between Ray and her fellow therapists. With respect to the September 10 discussion, Ray conceded that she did not notice if any of the officials of Respondent were paying attention and that they were talking among themselves. Further Ray also admitted she and other therapists were trying to talk quietly, so that Respondent's representatives would not hear. Thus her conclusionary and unsupported testimony that the managers were within "earshot" although they were 20 feet away, is not persuasive, particularly where Conant, Brambrut and Mancini credibly denied over-hearing any conversations in the cafeteria (by therapists) about lawyers or the Union.

Dolshun's testimony concerning the alleged conversation in late August, where she believes Mancini overheard Ray discussing lawyers and the Union is also not persuasive. I note initially that Ray furnished no corroboration of Dolshun's testimony concerning this alleged incident. Further Dolshun's testimony that the Union was discussed during the conversation is inconsistent with Ray's testimony that she went to the Union in mid-September. Also, Dolshun conceded that Mancini's back was to the table where the therapists were discussing these issues. Thus Dolshun could not be certain that Mancini overheard. Finally, I find Mancini's testimony that she did not overhear any such comments to be credible.

However, notwithstanding the above findings, the record reveals substantial evidence of Ray's continued exercise of concerted activity, in the presence of various representatives and agents of Respondent. Thus in June or July, Ray asked Conant in their initial meeting if the therapists would be independent contractors or employees after the Spa opens, and indicated that she believed that therapists had been misclassified for years. Additionally, on August 28, 2003, in the presence of fellow therapist Reiko, Ray discussed with Brambrut whether the therapists would be independent contractors or employees and whether they would be paid for down time. When Brambrut replied that they would be independent contractors and would not be paid for down time, Ray replied that she didn't think it was legal, and believed that the Labor Department considered it illegal to coerce the therapists "to stay and work with a threat." Reiko in Brambrut's presence expressed approval of Ray's position, and added that Ray sounded "like a lawyer."

Ray continued in the same vein during her interview with Brambrut and Hess. By this time Respondent had announced that the therapists would become employees. However, Ray expressed several complaints during this interview about the proposed new conditions, including the failure of part-time and on-call employees to receive benefits. While Hess disputed Ray by pointing out that such employees would receive room privileges at other Four Seasons Hotels, Ray continued to insist that at least for part-time and on-call employees, the

situation is really the same as the independent contractor situation. Ray added she believed that the therapists had been employees all along, and informed Hess that she used to work as a paralegal at the Proskauer Law firm, and had seen a memo on the firm's on-line site, about the importance of classifying employees properly. Finally, Ray stated that she had thought that Respondent had been represented by Proskauer, and was surprised that Respondent "was not taking that seriously." While neither Brambrut nor Hess said anything to Ray about these comments, Brambrut's evaluation form stated her concerns about Ray's "loyalty" to Respondent. I conclude that Brambrut's reference to "loyalty" related to these statements by Ray complaining about the proposed conditions, mentioning that she felt that therapists had been misclassified all along and her reference to the Proskauer law firm. In my view, Brambrut believed that Ray's mention of the law firm implied Ray might take legal action with respect to the concerns of her and her fellow therapists, I believe that belief was furthered by Ray's prior comments to Brambrut concerning the Labor Department and Ray's belief that Respondent had misclassified employees.[17]

Furthermore, at the training sessions in August and September of 2003, prior to the vendor being introduced to discuss its product, the therapists asked questions of and made comments to Conant, about the proposed working conditions at the new Spa. It is conceded that Ray was the most vocal and most persistent of all the therapists who spoke during these meetings, both before and after the August 29th announcement that the therapists would be employees when the Spa is reopened on September 15, 2003. There can be no question, and in fact is not disputed by Respondent, that Ray by raising group concerns at a meeting called by Respondent, engaged in concerted activity. *Anheuser-Bush Inc.,* 337 NLRB 3, 11 (2001), *enfd.* 338 F.3d 267 (4th Cir. 2003); *Chromalloy Gas Turbine Co.,* 331 NLRB 859, 863 (2002); *enfd.* 262 F.3d 184, 189-190 (2001); *Neff-Perkins Co.,* 315 NLRB 1229 (1994).

The concerted conduct by Ray during these meetings, included her comment to Conant about one of his responses to her questions, that she knew about the issue and had gone to and spoken to lawyers about the matter.

The record further reflects that on September 9 or 10, during another meeting, Ray questioned how Respondent computed the $11.00 per hour figure that it had announced for payment to the therapists. Conant replied that HR had established that it was fair in the market. Ray questioned the fairness of the amount and inquired as to what market was used and Conant suggested that Ray ask Mancini. Ray persisted and asserted that $66 per day is not fair for New York City, and reiterated again a complaint made by several other therapists at prior meetings, that it is not fair that the hourly pay is canceled if the therapists have treatments on their shifts. Ray characterized this as the same as before and not like "an employee situation." Conant tried to assure the therapists not to worry and stated that they would be receiving "tons of massages."

Ray then asked how vacation pay will be calculated, and Conant responded that the

[17] In this regard, I reject Brambrut's unconvincing and contrived explanation that she mentioned "loyalty" because she was concerned that Ray was "negative" towards the changes and negative towards being part of the team. I note that in other parts of the interview form, Brambrut wrote that Ray was "willing to try and adopt new ways of doing things." Further Brambrut had not been told at the time about the interview with Labak which had not taken place when Brambrut wrote her comments.

$66.00 per day figure would be used for that purpose. This response produced several adverse comments by Ray and Dolshun as to the insufficiency of this amount to take a vacation, culminating in a comment by Ray to Conant, "it's easy for you to say, you don't make $11 per hour." These comments resulted in laughter amongst the therapists and others present, and induced therapist Keith Lovinggood to stand up, make a "thumbs down" gesture, and "boo" for 15 seconds. Ray stood up, obviously in support of Lovinggood during this incident, but did not "boo" or make gestures. Seeing that, Conant became red in the face and was clearly upset. Ray attempted to apologize, by reminding him that therapists mean no disrespect, but these issues are important for the therapists to know, and "this is our livelihood."

Conant was clearly very upset about this incident, and he immediately reported it to Mancini, including the fact that Ray had stood up along with Lovinggood while he was "booing" and making a "thumbs down" gesture.

However, even where an employee, such as Ray engages in concerted activity, such activity can lose its protection under the Act, where the employee commits flagrant or egregious conduct rendering that employee unfit for further service. *Cibao Meat Products,* 338 NLRB 934, 935 (2003); *Chromalloy Gas, supra* at 863; *Consumers Power Co.,* 282 NLRB 130, 132 (1986). In assessing whether concerted conduct has lost the Acts protection, the Board is sensitive to the fact that an employee's right to engage in concerted activity must be balanced against the employer's right to maintain order and respect. *Eagle-Picher Industries,* 331 NLRB 169, 184 (2000); *Cibao Meat, supra; U.S. Postal Service,* 268 NLRB 274, 275 (1983); *NLRB v. Thor Power Tool Co.,* 351 F.2 584, 587 (7th Cir. 1965).

Further, in the context of concerted activity, a certain amount of leeway is allowed in terms of the manner in which employees conduct themselves. *Health Care Corp.,* 306 NLRB 63, 65 (1992); *Mast Advertising & Publishing,* 304 NLRB 819 (1991); *Thor Power Tool, supra.*

Respondent argues that Ray's conduct at the meetings, although concerted, lost the protection of the Act. *Carrier Corp.,* 331 NLRB 126 (2000); *Earle Industries v. NLRB,* 75 F.3d 400 (8th Cir. 1946); *Carleton Collage v. NLRB,* 230 F.3d 1075 (8th Cir. 2000); *U.S. Postal, supra*.

Respondent argues that Ray made derisive and gratuitous insults towards Respondent such as "sucked," undermined Respondent's authority by continuing to ask persistent questions in derogation of Conant's requests to stop distracting other trainers, and disrupted the training process. I do not agree.

I find Respondent's characterization of Ray's conduct to be misleading, exaggerated and not supported by my factual findings as detailed above. While Ray did make persistent comments and questions which were often critical of Respondent's proposed working conditions for therapists under the new Spa, they were far from sufficient to lose the Act's protection. She did use the word "sucks" in reference to some of Respondent's proposals, as well as its failure to answer questions, but these comments were also made by other therapists, and such statements, as well as much more derisive and profane remarks, at times directed at supervisors, have been held to be insufficient to warrant loss of the Act's protection. *Union Carbide Co.,* 331 NLRB 356, 360-361 (2000) (calling supervisor a "fucking liar"); *Thor Power Tool, supra* (Employee called supervisor a "horses' ass"); *CKS Tool & Engineering,* 332 NLRB 1578, 1583, 1586 (2000) (Employee stated "don't you think we give a f... about our work? ....goddam it, don't you think we are human beings."); *Neff Perkins, supra* at 1233 (Employee interrupted supervisor, told him to "hush-up and sit down," and called something "shitty" and said something "sucks"); *United Enviro Systems,* 301 NLRB 942, 943, 944 (1991) (Employee stated "This goddam paperwork is a pain in the ass. I don't have fucking time for it.");

Severance Tool Industries, 301 NLRB 1166, 1170 (1991); *enfd.* 953 F.2d 1384 (6th Cir. 1992). (Employee called supervisor a "son of a bitch."); *Burle Industries,* 300 NLRB 498, 504 (1990) (Employee called supervisor a "fucking asshole."); *Consumers Power, supra* at 132 (Employee raised his fist to supervisor); *Churchill's Restaurant,* 276 NLRB 775, 777 (1995) (Employee accused supervisor of being prejudiced against Mexicans.); *United States Postal Service,* 250 NLRB 4, 5-6 (1980) (Employee called supervisor a "stupid ass."); *Coors Container Co.,* 238 NLRB 1312, 1320 (1978) (Employee called Employer's agents "mother fuckers.")

Ray's conduct her is far less serious than the conduct in the above precedent, where the Board found that the Act's protection had not been lost. Similarly, with respect to the incident involving Lovinggood, Ray was highly critical of Respondent's proposal to pay $11.00 per hour, questioned Conant as to how that figure was arrived at, and then questioned and criticized the decision to use the $11.00 per day figure to compute vacation pay. Ray characterized Respondent's decision in these cases as "unfair," and stated to Conant in the course of their discussion, "it's easy for you to say, but you don't have to live on $11.00 per hour." Lovinggood at that point stood up, made a "thumbs down" gesture, and "boo'd" Conant for 15 seconds. Ray stood up in support of Lovinggood while these events clearly upset Conant, I conclude that Ray's conduct was at most considered rude and disrespectful, and far from sufficiently egregious to make her unfit for service and to warrant the loss of protection of the Act. *Union Carbide, supra* fn. 1; *Severance Tool, supra.*[18]

Indeed the most that can be said concerning Ray's conduct during the meetings, was that she was the most persistent and vocal of the therapists in her questions and complaints about Respondent's proposed working conditions for the therapists.[19] I credit Conant that to some extent, Ray's conduct resulted in a delay in the training, since time spent discussing the questions and complaints and questions of Ray, (as well as other therapists), delayed the presentations by the vendors and further training. However, that fact does not make Ray's conduct unprotected. I note that while Conant felt that training was being delayed by the alleged "interruptions" of Ray, he never directed Ray or anyone else to stop asking questions or making comments. Conant merely made general statements such as "we have to stay focused." Thus under no circumstances can Ray's conduct be considered insubordinate. *Anheuser-Bush Inc.,* 338 NLRB 3, 11 (2001), *enfd.* 388 F.3d 267, 172 LRRM 3214, 3224 (4th Cir. 2003) (Employee at captive audience meeting, contrary to specific instructions by supervisor to ask a question or sit down, continued to complain about working conditions.) *Beverly California,* 326 NLRB 232, 233 fn.2, 278-278 (1998) (Employee, at captive audience meeting, contrary to specific instructions by supervisors to sit down persisted in loudly asking if she could ask a question and tell her side. Held by Board to be "intemperate" conduct, but not sufficient to lose Act's protection.) *F.W. Woolworth,* 251 NLRB 1111, 1113 -1115 (1980) (At captive audience meeting, employee twice interrupted speech of supervisors, was told to sit down and second time, disobeyed supervisor's order, was told he was out of order, and argued with supervisor concerning his right to speak. Found Act's protection not lost, even though employee had specifically declined to follow directive of supervisors.)

The cases[20] cited by Respondent in support of its contention that Ray's conduct became

---

[18] While the issue is not directly before me, I also find that Lovinggood's conduct during that meeting was concerted and also did not lose the Act's protection, based upon the precedent cited above.

[19] See, *Neff-Perkins, supra* (Comments by employees may have appeared to Employer as "complaining too much," or "uncalled for," but were not egregious.)

[20] *Carrier Corp., supra; Carleton College, supra; Earle Industries, supra; U.S. Postal, supra.*

unprotected are clearly distinguishable and not controlling. In *Carrier Corp.,* the employee involved interrupted a meeting between a Manager and other employees to which he was not invited, insisted on discussing subjects unrelated to the meeting, and refused to acquiesce in the repeated directions to him that his concerns could be discussed later at a more appropriate time. The employee also pointed his finger at the supervisor and stated in effect that he was not afraid of the supervisor. The Board agreed that the employee's conduct, even if concerted, had lost the protection of the Act.[21]

Here however, Ray, unlike the employee in *Carrier* who interrupted a meeting to which was not invited, and where he did not belong, was invited to, and in fact was required to be present at the meetings conducted by Conant. Thus when an employer as Respondent did here, requires employees to be present, and permits questions and comments about working conditions, "one must expect questions or statements that one might not like." *Anheuser-Bush, supra* at 11. It also can expect employees to be persistent in demanding answers to their questions, and to make critical comments about proposed working conditions, even where Respondent would prefer not to discuss the matters any further, and to proceed to other business, such as training.

Most significantly of all, Conant did not, as did the supervisor in *Carrier,* give a direct order or instruction to Ray or any other employee to stop asking questions or making comments, and or that training is being delayed by therapists' discussions of working conditions. Conant's vague comments to the therapists to "stay focused", or to ask HR about certain areas, can hardly be construed as direct orders or instructions, and the failure of Ray to adhere to Conant's requests cannot be construed as insubordinate conduct. *Anheuser-Bush, supra; California Beverly, supra; F. W. Woolworth, supra.*

Similarly in *U.S. Postal Service,* 268 NLRB 274 (1983), the Board found conduct unprotected, where the employee became "excessively loud and insulting," while discussing his time card with a supervisor on the shop floor, and refused a direct order of the supervisor to quiet down and return to work. Here, unlike the employee in *U.S. Postal,* Ray was neither excessively loud nor insulting during any of the meetings, and did not refuse any orders to quiet down or return to work. Further, the concerted activities of Ray took place at a mandatory meeting, not on the work floor, as did the confrontation in *U.S. Postal.*

Earle Industries, and *Carleton College*, are both Circuit Court decisions, reversing the findings of the Board, where it was concluded in both cases that the conduct complained of, did not lose the protection of the Act.[22] I as an ALJ am bound by the Board decisions in these cases, rather than the Court decisions. Nonetheless, in my view the facts in both of these cases are also sufficiently distinct from the facts here, that a different determination would not be warranted even if the Court decisions were considered dispositive precedent. In *Carleton College,* the Court disagreed with the Board's decision that an employee had not lost the protection of the Act, by his use of "salty language" such as "pig" and "laughingstock," referring to the department. The Court did so however, based on its view that a professor, in the setting of college faculty, must be held to a higher standard than an ordinary employee, citing *NLRB v. Yeshiva,* 444 U.S. 672, 680 (1980) as recognizing the importance of collegiality to academic institutions. Indeed the Court specifically observed that the "salty language" used by the

[21] The ALJ had found that the employee lawfully was reprimanded for disruptive, intimidating and insubordinate behavior.

[22] *Carleton College,* 328 NLRB 217, 253-254 (1999); *Earle Industries,* 315 NLRB 310, 313-315 (1999).

employee might be excused in a different setting, but that in the context of a meeting with the dean of the college which was called to discuss professional expectations for the future, the employees' use of vulgarities and descriptions of the music department evidenced his disrespect of the music department, and "unwillingness to commit to act in a professional manner," 230 F.3d at 1081. Further the Court also relied on the fact that employee had refused to commit himself, although asked to do so by the dean, to abide by professional expectations, and instead expressed loyalty only to adjunct faculty and students. The Court concluded that the unwillingness to commit to acting in a professional manner rendered the employee "unfit for future employment at Carleton." *Id.* Clearly none of these factors are present here. Ray is not a member of a faculty, and did not express any unwillingness to commit herself to act in a professional manner as did the employee in *Carleton College.*

Earle Industries, supra, is even less dispositive. The Court found that the employee therein had lost the protection of the Act, because she defied the direct instructions of her supervisor, and deliberately lied in the course of the concerted activity. Here, Ray did not lie, and as noted above did not defy any direct orders of a supervisor or agent of Respondent.

Accordingly, I find the precedent that I have cited above, to be controlling, and warrant the conclusion that Ray did not engage in egregious conduct making her unfit for service, during the course of her concerted activity. Therefore I find that she engaged in protected, as well as concerted activities.

The next question becomes whether General Counsel has established that this protected conduct of Ray was a motivating or contributing factor in Respondent's decision not to hire her. There can be little question that General Counsel has so proven. While I have not found, as argued by General Counsel that Respondents agents or supervisors overheard Ray and other employees discussing lawyers, in connection with their concerted complaints, I did find that Ray mentioned at one of the meetings with Conant that she had spoken to a lawyer about a particular issue under discussion, and that Ray in a discussion with Brambrut mentioned her belief that the Labor Department considered it illegal for Respondent to force employees to be present at the hotel with the possibility of no pay. After that comment, fellow therapist Reiko said to Ray in Brambrut's presence that she sounded like a lawyer. I have further found above, that Brambrut's reference to her concerns about "loyalty" of Ray to the hotel, on the interview form, referred to her fear that Ray would instigate legal action against Respondent on behalf of herself and her fellow employees. Therefore, this evidence is sufficient in itself to conclude that a motivating factor, in Respondent's decision not to offer her a position, was her protected conduct.

More importantly however, the statements made by Respondent's supervisors and agents, as well as their own testimony, virtually admit that protected conduct was at least part of the reason for Respondent's failure to hire her. When Ray was informed of Respondent's decision not to hire her, she pressed Mancini and Hess for the real reasons. Mancini told her that it was because of her negative attitude and demeanor. Mancini did not further explain what she meant by that, but it is clear from Mancini's testimony that she was referring to Ray's protected conduct at the meetings, where she was frequently critical of Respondent's proposed conditions for the therapists. Thus Mancini conceded that her decision to recommend Ray not be hired was influenced by Ray's conduct at the meetings, and that she had held up training by "asking too many questions." As Mancini further admitted, describing her view of Ray's conduct; it was the manner in which she continuously just … just didn't let go of the same questions." Therefore, I find Mancini's reference to Ray's "negativity" was based on Ray's protected conduct. Furthermore, Hess also interjected her views to Ray, and told Ray that she had been "disrespectful to Conant in the meetings," and that she shouldn't have asked Conant

questions "about money in the meetings." When Ray responded that the meeting was about changes in the Spa, Hess replied that she should have pulled Conant aside and asked him questions. When Ray replied that the questions referred to all the therapists, Hess repeated that Ray was "disrespectful and negative" and she was "different than the others." It is obvious from the record, that Hess's assessment of Ray's conduct as "negative and disrespectful" involved her concerted conduct, which I have found to be protected. While Hess and or Respondent may have considered Ray's conduct "negative", "disrespectful" or "disruptive", that is not the issue. As I have detailed above, Ray was engaged in concerted activity, and her conduct did not rise to the level of egregious conduct sufficient to make her unfit for service warranting the loss of the Act's protection.

Additionally, at the meeting held by Respondent's supervisors and agents, when the decisions were made on whom to hire, it is admitted that Ray's protected conduct, i.e., her conduct in asking questions and making critical comments at training sessions was mentioned by everyone present as one of the reasons for Respondent's decision.[23]

Accordingly, an exceedingly strong prima facie case has been established that protected conduct of Ray was a motivating or contributing factor in Respondent's decision not to offer her employment. Since General Counsel has made such a strong prima facie showing of discriminatory motivation, Respondent's burden of proof under *Wright Line* to show that it would have taken the same action, absent protected conduct, is substantial. *Wild Oats Markets,* 344 NLRB #86 ALJD Slip op. p. 27, 31 (2003); *Vemco Inc.,* 304 NLRB 911, 912 (1991); *Eddy-Leon Chocolate,* 301 NLRB 887, 889 (1990). Respondent has fallen far short of meeting its burden in this regard.

Respondent argues that it has met that burden by establishing that it would have terminated Ray for unprotected conduct, i.e. her statement to Labak during Ray's technical interview that show that Ray did not intend to follow the protocols, and that "no one would know what she was doing in the treatment room." Respondent contends that this conduct by Ray, which did not involve concerted activity, provided a legitimate independent basis for Respondent not to hire Ray, and it has therefore met its *Wright Line* burden.

While I agree with Respondent that such conduct by Ray was neither concerted nor protected, and would provide a legitimate independent basis for Respondent to terminate Ray, that is not sufficient to meet Respondent's burden of proof. Respondent must establish not only that it had a legitimate (non protected) basis not to hire Ray, but must establish that it in fact would have acted on that basis, absent Ray's protected conduct. Put another way, Respondent must prove that it would not have hired Ray solely because of this or other non protected conduct. Respondent as I have observed, has fallen far short of meeting that burden of proof.

Respondent relies on the testimony of Conant, who states that the "deciding factor," in his decision to recommend that they not hire Ray was that he (based on Labak's report to him), did not believe that she would fulfill the requirements of performing all the protocols. However,

---

[23] For example Brambrut testified that in her view, Ray's negative behavior during the meetings, consisted of Ray making critical comments about Respondent's proposed conditions, rather than asking a question. That clearly encompassed protected conduct by Ray. Respondent cannot transform otherwise protected conduct into unprotected activity by characterizing the conduct as "negative behavior." See, *Enloe Medical Center,* 343 NLRB No. 61Slip op. p. 1 (2004) ("complaining" and "negative behavior" included Sect. 7 activity, and is protected.)

that testimony of Conant, even if believed, and even if it can be held to be Respondent's decision, is not sufficient to meet Respondent's burden of proof. Thus the fact that unprotected conduct constitutes the "deciding factor" in the decision, does not negate the fact that protected conduct was also "a motivating factor," in the decision, which Conant, as well as all others of Respondent's witnesses admit. What Respondent must demonstrate in order to meet its *Wright Line* burden, is that it would not have hired Ray whether or not she engaged in her protected conduct, or put another way, whether her stated refusal to perform the protocols and or other unprotected conduct would have been sufficient in themselves to have caused the refusal to hire. *St. Barnabas Hospital,* 334 NLRB 1000, 1015 (2001) (Statement by supervisor that "unprotected conduct" was "primary reason" for discharge insufficient to meet *Wright Line* burden.)

Thus Conant's testimony, even if credited, does not so establish, nor does the testimony of any of the other of Respondent's witnesses. Both Mancini and Brambrut conceded that Ray's protected conduct was one of the reasons for their decisions to recommend not hiring Ray, and that was so stated at the meeting where the decision was made. Hess, also a participant in the decision, did not testify, but other evidence establishes that she mentioned at the meeting, Ray's protected conduct as a reason for her recommendation, and in fact made no mention of Ray's refusal to perform the protocols, as even a factor in her decision.

Finally, Steinhauer the ultimate decision maker, who listened to all the participants in the meeting give their reasons, approved the consensus decision, without stating which of the reasons stated motivated him to agree that Ray not be hired. Indeed, the absence of testimony of the decision maker, as well as Hess, one of the participants in the decision, permits an adverse inference, which I draw, that their testimony would have been unfavorable to Respondent with respect to this issue. *Wild Oats, supra,* ALJD Slip op. at 31; *Government Employees (IBPO),* 327 NLRB 676, 699 (1999).

Respondent also argues that the record reveals that most if not all of therapists made complaints and asked questions during the training meetings, so it therefore follows that Ray's refusal to follow the protocols would have caused her not to be hired. I disagree. In fact, although most therapists asked questions and made comments, Ray was the most persistent and most vocal, and Respondent clearly considered her to be the leader and spokesperson for the other therapists. Conant contended that he did not recommend that Lovinggood not be hired, contrary to the other participants, because he felt that Lovinggood was being influenced by Ray's "negativity" during training, and if Ray was not there, Lovinggood's "negativity" would go away. Further, Respondent was aware that Ray had mentioned lawyers and the Department of Labor in connection with concerted complaints, and there is no evidence that any other therapists made any such comments.

Accordingly, based on the foregoing analysis and precedent, I conclude that Respondent has not met its *Wright Line* burden of establishing that it would not have hired Ray absent her protected conduct,[24] and it has therefore violated Section 8(a)(1) of the Act by such conduct.

[24] While evidence was adduced that some of Respondent's official criticized Ray's grooming or appearance, Respondent has not established that it would not have hired her for this reason. Indeed, I find this reason to be pretextual. Ray wore her hair the same way for most of her tenure working at the Hotel. Further, Ray received permission from Brambrut to attend the interview in her working clothes. I conclude that these reasons were not a factor in Respondent's decision not to hire Ray.

The Conclusions of Law

1. Respondent Hotel 57 LLC d/b/a Four Seasons Hotel is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. By failing and refusing to hire Susan Ray, because of her protected concerted activities, Respondent has violated Section 8(a)(1) of the Act.

3. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(2), (6) and (7) of the Act.

The Remedy

Having found that Respondent has engaged in certain unfair labor practices, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

I shall recommend that Respondent's offer a position to Ray, who was unlawfully denied hire by Respondent, referred to by the Board in *FES* as "instatement;" and to make her whole for any loss of pay and benefits caused by Respondent's discrimination against her. Backpay shall be computed in the manner prescribed in *F.W. Woolworth Co.,* 90 NLRB 289 (1950), with interest calculated in accordance with *New Horizons for the Retarded,* 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[25]

ORDER

The Respondent, Hotel 57 LLC d/b/a Four Seasons Hotel, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to hire applicants for employment, because they have engaged in protected concerted activities.

(b) In any like or related manner interfering with, restraining or coercing employees or applicants for employment, in the exercise of rights guaranteed them by Sect. 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order offer instatement to Susan Ray, to the position for which she applied or if that position is no longer available, to a substantially equivalent position, and make her whole for the discrimination against her in the manner set forth in the remedy section of this decision.

[25] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(b) Within 14 days from the date of the Order, remove from its files any reference to the unlawful refusal to hire Susan Ray, and within 3 days thereafter notify Susan Ray that this has been done, and the refusal to hire her will not be used against her in any way.

(c) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and coping, all payroll records, social security payment records, timecards, personnel records and reports, and all other records including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of Backpay due under the terms of this Order.

(d) Within 14 days after service by the Region, post at its New York, New York facility, copies of the attached notice marked "Appendix."[26] Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 11, 2003.

(e) Within 21 days after service by Region 2 file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C.

_____
Steven Fish
Administrative Law Judge

[26] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT refuse to hire applicants for employment, because they engage in protected concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees or applicants for employment in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL within 14 days from the date of this Order offer Susan Ray instatement to the position for which she applied, or, if that job no longer exists to a substantially equivalent position, and make her whole for the discrimination against her, plus interest.

WE WILL within 14 days from the date of this Order, remove from our files any reference to the unlawful refusal to hire and, within 3 days thereafter, notify her in writing that this has been done, and the refusal to hire her for employment will not be used against her in any way.

FOUR SEASONS HOTEL

(Employer)

Dated _____ By _____

(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

26 Federal Plaza, Federal Building, Room 3614
New York, New York 10278-0104
Hours: 8:45 a.m. to 5:15 p.m.
212-264-0300.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 212-264-0346.